

BEFORE THE  
**Federal Communications Commission**  
**WASHINGTON, D.C.**

<i>In the Matter of:</i>	)	MM Docket No. 01-317
	)	
Rules and Policies Concerning	)	
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

To: The Commission

**COMBINED RADIO AND TELEVISION STATIONS  
IN WEST VIRGINIA  
AND AFFILIATES**

*Law Offices*  
**PUTBRESE HUNSAKER & TRENT, P.C.**  
100 Carpenter Drive, Suite 100  
P.O. Box 217  
Sterling, Virginia 20167-0217  
(703) 437-8400

**Respectfully submitted,**

**WEST VIRGINIA RADIO CORPORATION**

**By: David M. Hunsaker**  
**Its Counsel**

**March 26, 2002**

## SUMMARY

West Virginia Radio Corporation and affiliates (“WVRC”) respectfully submits that the Commission should take no action to change the present Rules and station counting methodology described and set forth in 47 C.F.R. §73.3555(a).

The Commission’s authority to change the radio market definition rules in place at the time Section 202(b) of the Telecommunications Act of 1996 was enacted is questionable. Congress in adopting the specific market tier caps set forth in the Act was relying on the radio market definitions used by the Commission. There is nothing in the legislative history to suggest otherwise, and it is clear from reference to the House Minority Report, that the Congress had been made aware of the pace of radio consolidation between 1992 and 1996 and made a conscious policy decision to draft rules permitting greater consolidation. Even in the absence of this legislative history, the rules of construction of federal statutes, as articulated by the U.S. Supreme Court, require the presumption that Congress implicitly adopted the radio market definition rules first adopted in 1992. WVRC thus believes that the enactment of more restrictive provisions governing local ownership of commercial radio licenses would be *ultra vires*.

Even if the Commission’s authority to adopt more restrictive rules in this area were not in question, there is no need for them. No credible evidence of either economic injury to advertisers or of actual harm to the public interest has ever been shown. Instead, those who favor restrictive regulation speculate that a consolidated owner “*could*” cause increases in advertising rates otherwise unsupported by a competitive market, or mindlessly chant “diversity!” • as if the mere mention of the word justifies any and all restrictions on First Amendment rights. The fact of the matter is that competing outlets for media advertising exist in sufficient variety and number in every market to preclude any such control, and we have long since achieved the goal of diversity in every market • as admitted by the Commission itself in its *Fairness Report* to Congress in 1985. Appendices I and II attached to these Comments clearly demonstrate this to be the case in the two West Virginia markets in which WVRC competes.

Even if some aspect of economic harm could be shown, it would be unwise and inefficient to develop rules and/or processing procedures that duplicate the effort and function of other federal agencies. If a transaction does pose a genuine issue of undue control of market revenues, that matter can best be handled by either the Federal Trade Commission or the Antitrust Division of the U.S. Department of Justice. It is a waste of taxpayer dollars and the Commission's resources to engage in such economic analysis.

Moreover, since the radio broadcast industry is already substantially consolidated, amending the rules now will not change that. Only by a massive restructuring of the industry including forced divestitures of existing groups, which the Commission says it does not intend, could return us to the "fragmented" radio market landscape that the Commission only a few years ago deemed to be harmful to the public interest. Such restructuring would create tremendous economic upheaval, causing station values to plummet and would reduce incentives of licensees to provide "niche" programming to target audiences: something that is economically infeasible for the standalone or single AM-FM owner. The partial retroactivity the Commission is proposing will only harm the standalones and small group owners, and prevent them from trying to remain competitive in a consolidated industry against the "mega-groups" such as Clear Channel Communications.

A decision to abandon the radio contour overlap market definition procedure and relying, instead on radio market definitions provided by outside commercial services is ill-advised. Numerous problems will result if the Commission returns to the use of Arbitron radio market definitions. Moreover, use of audience data to define markets injects the Commission unavoidably in the programming decisions of a licensee that ultimately affect audience ratings. This raises serious First Amendment issues.

Similarly, reliance on financial data from sources such as BIA to make ownership decisions is also ill-advised. The accuracy of BIA data depends upon the voluntary response by stations in the market to report earnings, and to report them accurately. The resulting data can be substantially inaccurate, as shown by a review of the Charleston, West Virginia market.

## TABLE OF CONTENTS

<i>Section</i>	<i>Page</i>
SUMMARY .....	i
I. INTRODUCTION .....	2
A. Background of Proceeding.....	2
B. Statement of Interest .....	7
II. ARGUMENT .....	8
A. The Commission Lacks Statutory Authority to Change the Radio Market Rules .....	8
1. <i>Congress Was Fully Aware of the Nature and Application of the Commission's Rules on Defining Radio Markets Adopted in 1992.</i> .....	8
2. <i>Placement of More Severe Restrictions on Radio Ownership than Those Predicated by the Act is <u>Ultra Vires</u>.</i> .....	9
B. No Need for Amendment of the Rules or Counting Methodologies has been Established.....	10
1. <i>No Evidence of Economic or other Harm to the Public Interest has been Cited.</i> .....	10
2. <i>Competing Outlets for Media Advertising Exist in Sufficient Variety and Numbers to Preclude the Speculative Economic Harm Resulting from Radio Consolidation</i> .....	14
3. <i>Other Mechanisms Presently Exist to Address Legitimate Concerns Over Undue Economic Concentration</i> .....	15
-- <i>Other Agencies Are Better Suited to Investigate and Adjudicate Antitrust Issues</i> .....	15
-- <i>Devotion of Commission Resources to Economic Analyses of Proposed Radio Mergers and Consolidations is Inefficient and Wasteful of Public Resources.</i> .....	16
C. Alternate Methodologies Under Consideration by the Commission Will <i>Not</i> Address its Fundamental Concern .....	19
1. <i>The Radio Broadcast Industry is Already Substantially Consolidated</i> .....	19
2. <i>Reliance on Outside Commercial Services to Provide the Data to Define the Radio Market is Ill-Advised</i> .....	21
III. CONCLUSION.....	25
APPENDIX I. The Morgantown-Clarksburg-Fairmont, WV Media Market .....	App. I-1 - I-11
APPENDIX II. The Charleston, WV Media Market .....	App. II-1 - II-6

**BEFORE THE**  
**Federal Communications Commission**  
**WASHINGTON, D.C.**

<i><b>In the Matter of:</b></i>	)	MM Docket No. 01-317
	)	
Rules and Policies Concerning	)	
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

To: The Commission

**COMMENTS OF WEST VIRGINIA  
RADIO CORPORATION AND AFFILIATES**

Comes now WEST VIRGINIA RADIO CORPORATION (“WVRC”), by Counsel, and pursuant to Sections 1.415 and 1.429 of the Commission’s Rules (47 CFR §§1.415, 1.419), and Paragraph 55 of the Commission’s *Order and Notice of Proposed Rule Making* in the above-captioned proceeding,<sup>1</sup> hereby respectfully submits these Comments, and requests that the recommendations contained herein be duly considered and adopted. In support whereof, the following is shown.

**I. INTRODUCTION.**

**A. Background of Proceeding.**

---

<sup>1</sup> DA FCC 01-329, 66 F.R. 63986, released November 9, 2001 (hereafter “*NPRM*”).

1. By *Order* released December 13, 2000 the Commission issued a *Notice of Proposed Rule Making*<sup>2</sup> seeking comment on whether and how the Commission should modify the way in which it determines the dimensions of radio markets and counts the number of stations in them. In addition, the Commission stated it was seeking comment on whether and how the present rules should be amended to change the method by which the number of stations owned by a party in a radio market for the purpose of applying the multiple ownership rules under 47 C.F.R. §73.3555.<sup>3</sup>

2. A number of Comments, including Comments of WVRC in response to that *Notice* were duly filed in February of 2001. However, the Commission took no action in response to the Comments until the release of the instant *NPRM*, wherein it consolidated the prior rule making with the instant proceeding.<sup>4</sup>

3. In its Introduction, the Commission traces the history of the regulation of multiple ownership rules for radio broadcast stations from 1938 to the present. WVRC has nothing substantive to add to that discussion except to note that the Commission's decision to permit consolidation in local radio markets in 1992 arose out of a *major economic crisis* faced by many radio station licensees at that time. Although trends in the economy were contributing factors, the media diversification policies adopted by the Commission between 1980 and 1992 created tremendous economic hardship on an industry already faced with competition from a multitude of other media not subject to similar ownership restrictions.

---

<sup>2</sup> *Definitions of Radio Markets*, Notice of Proposed Rulemaking, MM Docket No. 00-244, 15 FCC Rcd 25077 (2000) (*Market Definition NPRM*).

<sup>3</sup> The complete text of Section 73.3555 of the Rules is set forth in *Appendix A* to these Comments.

<sup>4</sup> Since MM Docket No. 00-244 has been consolidated into this proceeding, WVRC respectfully requests that its Comments in Docket 00-244 filed on February 26, 2001 be incorporated herein by reference.

4. It is not overstatement to conclude that the Commission's diversity-generating policies of the 1980's • typified by MM Docket 80-90 and its progeny • led to the economic crisis of commercial radio broadcasting in the early 1990's. At a speech to the NAB in July, Acting Chairman James Quello told broadcasters that he was considering imposing a freeze on the allotment of any more FM channels. "I think in the name of diversity and competition we've licensed too many radio stations..." "I never thought I'd live to see the day when 60% of radio stations are losing money." The point was raised again by Acting Chairman Quello in a speech to the New York State Broadcasters Association in late July, 1993, where he said, "I don't see where the public interest would be served by allowing other people to go bankrupt."<sup>5</sup>

5. As noted in the *NPRM*, in 1989, the Commission had amended the contour overlap test from one of *primary service contours* to that of *principal community contours*, which decreased the likelihood of contour overlap between closely located stations and thereby increased the ability of a single party to own those stations.<sup>6</sup> In relaxing the rule, the Commission acknowledged that ownership diversity was not an end in itself, but was rather a means of "promoting diversity of program sources and viewpoints."<sup>7</sup> That being the case, the Commission concluded that its rule change would not adversely affect programming and viewpoint diversity because the number of media outlets had increased since the contour overlap test was developed in 1964 and because the efficiencies that common ownership would generate could lead to programming benefits.<sup>8</sup> Additionally, the Commission noted that radio stations

---

<sup>5</sup> BROADCASTING AND CABLE MAGAZINE, p. 14 (Aug. 2, 1993). Ultimately, the problem was addressed by Congress in the Telecommunications Act of 1996, which permitted a significant amount of radio consolidation in a local market in order to give economic stability to the industry.

<sup>6</sup> *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, First Report and Order, 4 FCC Rcd 1723, 1723 (1989) (*1989 Decision*).

<sup>7</sup> *Id.* at 1724.

<sup>8</sup> *Id.* at 1727 (¶¶ 31, 37).

faced increasing competition in the advertising market from television stations, cable systems, and newspapers.

6. In 1992, in response to the severe economic crisis affecting the radio industry,<sup>9</sup> the Commission further relaxed the rule to permit same-service common ownership (or “duopoly”) of radio stations in those radio markets having a certain number of stations.<sup>10</sup> A market-tier approach, which later became incorporated into the 1996 Telecommunications Act, was adopted. The new rules provided as follows:

In markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.

In markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

In markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

In markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM stations, provided that the combined audience share of the stations does not exceed 25 percent.<sup>11</sup>

7. Although the Commission recognized that the 25 percent audience share limit was

---

<sup>9</sup> “Specifically with respect to competition, the Commission found that the radio industry’s share of the local advertising market, in which the Commission included television stations and cable systems, had remained flat. Moreover, the Commission found that the inability of radio stations to realize the efficiencies arising from common ownership harmed diversity and competition by making it more difficult for radio stations to compete and to provide valuable programming services.” *NPRM* at ¶8.

<sup>10</sup> *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd. 2755, 2773-2774, (1992), *recon. granted in part*, 7 FCC 2d 6387, 71 RR 2d 227 (1992) (“*Duopoly Order*”).

<sup>11</sup> *Id.* at 2776, ¶40; *NPRM*, note 29. For stations that were not in Arbitron markets, the Commission used a contour overlap market definition under which a radio market was the area encompassed by the principal community contours of the commonly owned stations whose contours overlapped. For purposes of applying the numerical caps, the number of stations in the market was calculated based on the number of commercial radio stations whose principal community contours fell fully or partially within the radio market. To apply the audience share test in non-Arbitron markets, applicants were required to commission an audience survey for the counties that were located in whole or in part in the radio market. *Id.* at 2778-79 (¶¶ 45-46) & n.101; 2798. Where Arbitron published county-by-county surveys, applicants were required to use that data as opposed to any other survey source.



“substantially more restrictive than ordinary antitrust concerns would mandate,” it justified the policy because the restrictions also were “designed to protect and promote a diversity of voices – a concern distinct from antitrust objectives.”

8. On reconsideration, the Commission, responding to criticism from both Congress and the industry, simplified the tier approach initially adopted. A more manageable two-tier definition of “small” and “large” radio markets was adopted. “Market,” whether large or small was defined in terms of the number of principal city contours of stations overlapped with the stations which were the subject of the duopoly showing.<sup>12</sup>

9. “Small Markets” were those which consisted of 14 or fewer commercial radio stations. In these markets, a party might own an attributable interest in no more than three stations, no more than two of which were in the same class of service. One additional limitation was imposed: the three-station combination must constitute less than 50% of the commercial radio stations in that small market.

10. “Large Markets” were those radio markets with 15 or more commercial radio stations.<sup>13</sup> If a licensee were part of a large market, it could own up to four stations, provided that no more than two were AM and two were FM. The Commission continued to rely on the audience listening behavior statistics as calculated by Arbitron or another professional audience research service where Arbitron data was not available. Where the proposed acquisition exceeded a combined audience share of 25%, the Commission considered it *prima facie* evidence that the proposed acquisition would not be in the public interest due to the resulting concentration control in the market.

11. The Commission rejected the arguments of a number of petitioners to abandon the use of audience share data as a determinant of compliance with the expanded local ownership rules. Many argued that such audience share data was inherently unsuitable for purposes of analyzing market power. The Commission contended however, that use of audience data was a more effective way of accounting for

---

<sup>12</sup> Reliance on radio market definitions created by Arbitron for this purpose was abandoned. However, the Commission said it would continue to rely on Arbitron data in determining the 25% audience cap.

<sup>13</sup> Again, the *number* of commercial radio stations in the market was to be determined by the calculation of the principal city (or “city-grade”) contours of the subject stations and those of each station whose city-grade contour intersected that of one or more of the subject stations.

diversity and competition in a particular market than by reference to the technical facilities of the stations involved, and assuming that superior technical facilities would result in a greater market share. At the same time, the Commission made clear that the 25% benchmark was not intended to freeze a combination's market share at a particular level, or to require divestiture of existing 3- or 4-station combinations if they later reached that level.<sup>14</sup>

---

<sup>14</sup> *Id.*

12. In 1996, Congress enacted a comprehensive set of laws affecting a number of telecommunications issues.<sup>15</sup> Among the provisions adopted was a directive to the Commission to revise its multiple ownership rules by eliminating any national cap on ownership of radio stations, and by relaxing even further, the radio duopoly rules established in 1992. The new local ownership rules were to read as follows:

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.<sup>16</sup>

The provisions were quickly implemented by the Commission into the present form of Section 73.3555(a) of the Rules.<sup>17</sup>

---

<sup>15</sup> “TELECOMMUNICATIONS ACT OF 1996,” Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>16</sup> *Id.*, §202(a) and 202(b)(1).

<sup>17</sup> See *Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 (March, 1996). No further changes have been made to this provision of the Rules. *NPRM*, ¶14.

13. In addition to Section 202(b), Congress also enacted Section 202(h), which directs the Commission to “review its rules adopted pursuant to this section and all of its ownership rules biennially . . . and [to] determine whether any of such rules are necessary in the public interest as the result of competition.”<sup>18</sup> Section 202(h) further directs the Commission to repeal or modify any ownership rules that it finds to be “no longer in the public interest.”<sup>19</sup> In its 1998 Biennial Review, the Commission, while expressing concern about possible “over-consolidation” in the radio industry and its affect on competition, advertising rates and the public interest generally, decided that no change to the radio ownership rules would be made at that time.<sup>20</sup> However, in view of concerns expressed by certain members of the public and by individual commissioners over how radio markets were defined, the Commission launched the rulemaking proceeding in MM Docket 00-244 to examine possible revisions to its methodology for defining the market and counting the number of commonly owned and independent radio stations.<sup>21</sup> As noted above,<sup>22</sup> WVRC and others submitted comments in that proceeding in February of 2001, but the Commission took no action until the release of the instant *NPRM*, broadening the scope of the inquiry.

## **B. Statement of Interest.**

14. WVRC is the Licensee of Radio Stations WAJR (AM) and WVAQ (FM). Morgantown, West Virginia, and WSSN (FM), Weston, West Virginia.<sup>23</sup> The majority owners of WVRC<sup>24</sup> also have majority control of the following affiliated broadcast companies:

---

<sup>18</sup> 110 Stat. at 111-12.

<sup>19</sup> *Id.*, at 112.

<sup>20</sup> *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, 11091 (¶60) (2000) (*Biennial Review Report*)

<sup>21</sup> *Market Definition NPRM*, *supra*, Note 2.

<sup>22</sup> *Supra*, ¶2.

<sup>23</sup> WVRC is also the operator of *MetroNews*, a news and sports network which provides news programming and coverage of college sports events to approximately 53 radio station subscribers in West Virginia, and adjacent states of Pennsylvania, Ohio, Virginia and Tennessee.

<sup>24</sup> In addition to the broadcasting companies listed, the principals of WVRC also have majority control of West Virginia Newspaper Publishing Company, publisher of the Morgantown DOMINION-POST, a daily

**Affiliate Licensee Name**

**Call Sign(s) and Community**

**West Virginia Radio Corporation of Elkins**

WDNE AM-FM, Elkins, WV

**West Virginia Radio Corporation of Clarksburg**

WFBY (FM), Clarksburg, WV

**West Virginia Radio Corporation of Salem**

WAJR-FM, Salem, WV

**West Virginia Radio Corporation  
of Charleston**

WCAW (AM), WCHS (AM), WSWW (AM),  
WKWS (FM) & WVAF (FM), Charleston, WV  
WKAZ (FM), Miami, WV  
and WRVZ (FM), Pocatalico, WV

---

newspaper having general circulation (approximately 20,000 paid subscriptions) in Morgantown, West Virginia.

As a group owner of radio stations in the Morgantown-Clarksburg-Fairmont, WV and Charleston, WV Radio Markets,<sup>25</sup> WVRC has a direct interest in the outcome of this proceeding.

## II. ARGUMENT

### A. The Commission Lacks Statutory Authority to Change the Radio Market Rules.

#### 1. *Congress Was Fully Aware of the Nature and Application of the Commission's Rules on Defining Radio Markets Adopted in 1992.*

15. As noted above, the current method of defining and determining the size of radio markets had been in effect for four years at the time Congress adopted the *Telecommunications Act of 1996*. Congress was thus aware of the Commission's use of principal community contours defining and counting the number of stations in a radio market when it passed the 1996 Act.

16. Not only was Congress *aware* of the methodology, that methodology was *codified* into the Act. Indeed, if the Commission had not developed rules for defining the radio market prior to the passage of the Act, the 4-tiered approach specified in Section 202(b)(1) of the statute would be meaningless.

17. The FCC's speculation that Congress could not have intended<sup>26</sup> the significant consolidation in the radio industry that has taken place is unwarranted. There is no legislative history indicating such an intent, and a review of the various drafts of the Act suggest the

---

<sup>25</sup> These radio markets are defined and ranked by The Arbitron Company as Numbers 166 (Charleston, WV) and 193 (Morgantown-Clarksburg-Fairmont, WV), respectively.

<sup>26</sup> *Biennial Review Report*, ¶¶65-68; *NPRM*, ¶16.

opposite: that the adopted language was a compromise of language that was even broader.<sup>27</sup>

---

<sup>27</sup> For example, earlier House proposals called for the complete elimination of ownership restrictions on radio ownership.

18. Although Congress did not specifically adopt the definition of a radio market set forth in Section 73.3555(a)(3)(ii), it did not need to do so. The language defining a radio market contained in §73.3555(a)(3)(ii) was already on the books and had been unchanged since it was originally adopted in 1992. Congress was certainly aware of that language, and relied on it when arriving at the four-tier approach to local radio ownership.<sup>28</sup>

2. *Placement of More Severe Restrictions on Radio Ownership than Those Predicated by the Act is Ultra Vires.*

19. It also cannot be disputed that Congress was, and remains fully aware of the pace of mergers and consolidations in the radio industry.<sup>29</sup> Yet, it has made no move to amend the Act or otherwise curtail its application. This is certainly not due to any trepidation on the part of the present Congress. When the Commission has ventured into new areas of regulation not contemplated by Congress, Congress, or at least many of its more vocal members, has been quick to criticize the Commission and to warn that it is proceeding on dangerous ground.

---

<sup>28</sup> See, *Separate Statement of Commissioner Harold W. Furchtgott-Roth, Market Definition NPRM (supra, n. 2)*, p. 23; *Separate Statement of Commissioner [now Chairman] Michael K. Powell, Market Definition NPRM*, p. 24.

<sup>29</sup> The *Minority* Report on H.R. 1555 (the bill which ultimately became the basis for the final language of the Telecommunications Act) expressed concern over the number of radio consolidations that had already taken place under the “Duopoly Rule,” adopted in MM Docket 91-140. See *H. Rept.* 104-204, House of Representatives, 1st Session, “Dissenting Views • Mass Media Concentration.”



20. An apt example of Congress' reaction to what it perceived as unwise, if not unauthorized new initiatives is the rider contained in the *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act*.<sup>30</sup> The rider significantly scaled back the reach and breadth of the Commission's Low Power FM *Order*,<sup>31</sup> and directed the Commission to require LPFM applications to meet third-adjacency channel protection standards contained in §73.207 of the Rules.<sup>32</sup> Members of Congress were also quick to express concern over the Commission's announcement that it would implement a new test to determine whether a religious broadcaster seeking noncommercial status could qualify as an "educational" entity.<sup>33</sup>

21. Accordingly, WVRC believes that the Commission is precluded from modifying the substance of §73.3555(a)(3)(ii) without prior consultation with, *and authorization by*, the Congress. If the Commission fails to obtain Congressional blessing to a change, it is reasonable to expect that appeals of any *Report and Order* in this proceeding will be taken to the U.S. Court of Appeals with a sustainable claim of *ultra vires*.

**B. No Need for Amendment of the Rules or Counting Methodologies has been Established.**

*I. No Evidence of Economic or other Harm to the Public Interest has been Cited.*

22. In its very brief narrative statement in MM Docket 00-244, the Commission identified not a single harm that has resulted from the present method of defining radio markets.

---

<sup>30</sup> 2001, H.R. 4942, enacting into law H.R. 5548, 106th Congress, Title VI, Sec. 632 (2000).

<sup>31</sup> MM Docket 99-25, adopted January 20, 2000, released January 27, 2000.

<sup>32</sup> See, *Notice of Acceptance of Low Power Fm Broadcast Applications and Notification of Petitions to Deny Deadline*, (Report No. LPFM-S-1, released: December 21, 2000).

<sup>33</sup> See, *WQED Pittsburgh* (FCC 99-393) \_\_\_ FCC Rcd \_\_\_, 19 CR 214 (1999), *On Reconsideration*, (FCC 00-25), \_\_\_ FCC Rcd \_\_\_, 19 CR 241 (2000); see also, *Way of the Cross*, 101 FCC 2d 1368, 1372, n. 5 (1985), citing *Notice of Inquiry* in Docket No. 78-164, 43 Fed. Reg. 30842, 30844-45 (1978).

Individual statements by Commissioners over the past two years have expressed concern that there was a *danger* of control of advertising rates.<sup>34</sup> However, in not a single instance of what some Commissioners regard as an unintended “over-consolidated” market has evidence of anti-competitive conduct in violation of the public interest come to light.

---

<sup>34</sup> See, *NPRM*, separate Statements of Chairman Kennard and Commissioner Tristani. While both allege that the public has been harmed by the creation of multi-station groups in some markets, neither their individual Statements, nor the *NPRM* itself, identify what economic or other harm has occurred by the application of the current rules.

23. In the instant *NPRM*, the Commission attaches spreadsheet “studies” from three different Arbitron Radio Markets as illustrations of significant consolidation: Syracuse, New York (Market No. 78), Rockford, Illinois (Market # 150) and Florence, South Carolina (Market #204) utilizing information derived from Arbitron and BIA Financial as of November 5, 2001. If these studies are offered to show that significant consolidation of radio ownership exists in Radio Markets ranging in size from 78 to 204, that much is stipulated.<sup>35</sup> But the information presented in the spreadsheets provide no evidence whatsoever of anti-competitive practices, inflation of advertising rates, or that the public interest is not being served.

24. With respect to BIA’s estimate of a station’s share of ad revenues, the statistics are frequently unreliable and, in any event, are meaningless, as they exclude non-radio sources which compete with radio for ad revenues. With regard to the use of audience data, if the Commission learned anything from its four-year experience with utilizing audience data to make radio ownership decisions,<sup>36</sup> it should have learned that radio audiences are fickle, and a station on top in the Fall Book may be near the bottom in the Spring Book. The use of listening audience share

---

<sup>35</sup> However, when “out-of-market” stations are factored into the equation, the three example markets seem far less consolidated. All three markets are near other radio markets and lose significant audience share to these “out-of-market” stations, the Rockford Market being only the most extreme example.

<sup>36</sup> *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2773-74 (¶ 35) (1992). See, e.g., *Franklin Communications Partners, L.P.*, 8 FCC Rcd. 4909 (1993) (audience share under 25% on filing, over 25% after acceptance of application); *Patteson Brothers, Inc.*, 8 FCC Rcd. 7595 (1993) (evidence of “trends” showing less than 25% audience share will not overcome presumption of excessive concentration by the most recently published audience measurement period showing over 25%; see also, D. Hunsaker, “Duopoly Wars: Analysis and Case Studies of the FCC’s Radio Contour Overlap Rules,” 2 COMMLAW CONSPECTUS, pp. 21-41 (1994).

seems too volatile and erratic a basis for judging whether a proposed transaction would or would not be in the public interest.

25. The studies also demonstrate that there remain a plethora of programming *choices* for the public, and that consolidation has *not* resulted in the limitation of program formats or choices available to the listener. The economies of scale provided by consolidation have resulted in *precisely* what the Commission said it was hoping for when it modified the duopoly rules in 1992.<sup>37</sup>

26. Missing from the Commission's or any other party's analysis is any factual data tending to prove that the present level of consolidation is *bad*. To be sure, many have pointed to the "dangers" of over-consolidation, such as economic control of the marketplace and lack of diversity of programming, but empirical evidence of harm to the public interest caused by radio consolidation is woefully lacking.<sup>38</sup> Given radio's small share of the total advertising revenue pie in any market, it is extremely unlikely that a radio group owner could or would wield an undesirable level of control of local or national advertising in that market.<sup>39</sup> Rather, the evidence that does exist demonstrates that market *fragmentation* is bad. In fact, by 1992 the Commission had

---

<sup>37</sup> See, *1989 Radio Decision*; see also, *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2773-74 (¶ 35) (1992).

<sup>38</sup> Some have argued, erroneously, that there is less community service programming today than previously. WVRC cannot speak for every radio market but that is certainly not true with respect to either the Morgantown or Charleston, West Virginia radio markets. See *Appendices I and II, infra*.

<sup>39</sup> Newspapers and other print media still account for the largest share, followed by television advertising. See, NAA, *Facts About Newspapers* (2001 Ed.)

concluded that *market fragmentation* in the radio industry was an *evil*, and that revising its radio local ownership rules specifically to permit consolidation was the *cure*.<sup>40</sup>

27. The only “harm” of the present rules discussed by the Commission in MM Docket 00-244 was that the present methodology described in §73.3555(a)(3)(ii) and used by the Mass Media Bureau resulted in allowing an entity to own or control radio stations in excess of that permitted under §73.3555(a)(1). In initiating Docket MM 00-244, the Commission offered examples of these “unintended effects.” These examples, noted the Commission, establish that a single entity could end up owning more than the maximum number of stations through the multi-market analysis (*i.e.*, “daisy-chaining”) the Staff requires. However, in decrying this unintended effect, the Commission itself has equivocated on the term, “Radio Market.”

28. Exceeding the maximum number specified in §73.3555(a)(1) is only possible if one juggles two meanings of Radio Market simultaneously. The daisy-chain ownership situation shown in the Youngstown, Ohio example in MM Docket 00-244 covers territory both within and without the Youngstown MSA. As the current rules are applied, there are, in fact, *several* radio markets defined by the contour overlap of the commonly-owned stations. Stations in the southwestern-most contour “market” do not overlap with stations in the northeastern-most contour market, and, in fact, may not be listened to, or listenable by, residents in the northeast contour market. Thus, calling them all “Youngstown” stations is inappropriate.

---

<sup>40</sup> *Revision of Radio Rules and Policies, supra*, 7 FCC Rcd at 2773-74 (¶ 35) (1992).

29. A second form of equivocation is the reference to Arbitron as the determiner of the “Radio Market.” If Arbitron shows only **X** number of stations in the “market” while the contour analysis methodology specified in §73.3555(a)(3)(ii) shows a much larger number, that is because Arbitron defines the term, “market” differently than §73.3555(a)(3)(ii). An Arbitron “Radio Market” is usually commensurate with the MSA for that urban area as defined by the U.S. Bureau of the Census.<sup>41</sup> There will always be a difference in result if one starts out with two different ways of counting. WVRC submits that much of the exasperation over recent Mass Media Bureau rulings expressed by individual Commissioners and public interest groups is due to this kind of unwitting equivocation and not to any internal inconsistency in the application of the Rules.

2. *Competing Outlets for Media Advertising Exist in Sufficient Variety and Numbers to Preclude the Speculative Economic Harm Resulting from Radio Consolidation.*

---

<sup>41</sup> Except for a few historical exceptions, Arbitron’s “Metro Survey Area” and the U.S. Office of Management and Budget’s “Metropolitan Areas” usually describe the same geographical boundaries. A station that is outside the MSA but within what has been designated the “Total Survey Area” (TSA) is shown as “out-of-market.”

30. In order for there to be significant harm from the consolidation of local radio ownership within markets, it must first be established that there are no alternatives for the media advertiser to use other than commercial radio to present information about its product or service. In spite of the Justice Department's practice of singling out radio advertising as a separate product market during the Clinton Administration, there is no evidence whatsoever that a media advertiser would not consider *competitive* alternative media should radio advertising rates become too high. One of the reasons cited by the Commission for relaxing the local ownership rules for radio in 1989, and again in 1992 was the *increase in competition* from the *alternative media* such as cable, television and newspapers.<sup>42</sup> That competition has not disappeared; it has become greater.

31. To illustrate, **Table 1** appearing on the following page shows estimates of advertising expenditures for all media in 1999 and estimated for 2000. A total of \$48.7 Billion was spent in 2000. Of that amount, only \$19.3 Billion, or less than 8% was spent on radio advertising. Alternative media whose share of ad revenues equaled or exceed that for radio, were Daily Newspapers (20%), Broadcast Television (18.4%), Direct Mail (18.3%), and Miscellaneous sources such as weeklies, shoppers, pennysavers and cinema advertising (12.9%).

**Table 1. U.S. ADVERTISING EXPENDITURES • ALL MEDIA**

(SOURCE: NAA, *Facts About Newspapers*, 2001 Ed.)

	2000* (millions)	Percent of Total	1999† (millions)	Percent of Total	Percent Change
<b>Daily Newspapers Total</b>	\$48,670	20.0	\$ 46,289	20.9	5.1
<b>National</b>	7,653	3.1	6,732	3.0	13.7
<b>Retail</b>	21,409	8.8	20,907	9.4	2.4
<b>Classified</b>	19,608	8.1	18,650	8.4	6.1
<b>Magazines</b>	12,370	5.1	11,433	5.2	8.2
<b>Broadcast Television</b>	44,802	18.4	40,011	18.0	12.0
<b>Cable Television</b>	14,429	5.9	12,570	5.7	14.8

<sup>42</sup> 1989 Decision, *supra* Note 6; 1992 Duopoly Order, *supra.*, Note 10.

Radio	19,296	7.9	17,215	7.8	12.1
Direct Mail	44,591	18.3	41,403	18.7	7.7
Yellow Pages	13,228	5.4	12,652	5.7	4.6
Miscellaneous**	31,491	12.9	28,490	12.8	10.5
Business Papers	4,915	2.0	4,274	1.9	15.0
Outdoor Advertising	5,176	2.1	4,730	2.2	83
Internet	4,333	1.8	2,832	1.3	63.0
Total - National	148,522	61.0	132,544	59.7	12.1
Total - Local	94,778	39.0	89,405	40.3	6.0
Total - All Media	243,300	100.0	221,949	100.0	9.6

\*Preliminary data

† = Revised data

\*\*Miscellaneous includes weeklies, shoppers, pennysavers and cinema advertising. Estimates include all costs: time and talent, space and production.

32. With respect to the two rated West Virginia markets in which WVRC operates radio stations, the evidence is clear that there exist numerous alternative media that compete directly and indirectly for the same local and regional advertising dollars as do commercial radio stations. *Appendix I* (Morgantown-Clarksburg-Fairmont, WV) and *Appendix II* (Charleston, WV) provide a description of the alternative media available.

3. *Other Mechanisms Presently Exist to Address Legitimate Concerns Over Undue Economic Concentration.*

33. -- *Other Agencies Are Better Suited to Investigate and Adjudicate Antitrust Issues.*

Even if examples of harm to the public in the form of artificially elevating the rates charged for advertising could be documented, other federal agencies are much better suited to deal with such matters.

34. Market concentration and anti-competitive issues are within the purview of both the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.<sup>43</sup> Detailed federal legislation and regulations under the umbrella of *Hart-Scott-Rodino*<sup>44</sup> have been

<sup>43</sup> By recent agreement between DOJ and the FTC, the Anti-Trust Division of the Department of Justice is primarily responsible for reviewing proposed mergers and consolidations.

<sup>44</sup> *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, Pub. L. 94-435, 90 Stat. 1383 (Sept. 30,



enacted to regulate acquisitions and mergers of all forms of business, not just electronic media.

Moreover, even though a proposed consolidation, because of its size, does not trigger the pre-merger filing requirements under *Hart-Scott-Rodino*, the Justice Department can, nevertheless, launch its own inquiry into the proposed merger and can, and has ordered the parties to defer completing the merger until after its investigation has been completed.<sup>45</sup> Moreover, individuals of groups believing that an unfair trade practice has taken place can also refer the matter to the Attorney General's Office of their respective State.

35. The Media Bureau Staff has taken the position, however, that despite a DOJ termination of its investigation, the Commission may continue to hold a transfer or assignment application in limbo because its own "economists" still have unspecified "concerns."<sup>46</sup>

36. -- *Devotion of Commission Resources to Economic Analyses of Proposed Radio*

---

1976), codified as 15 U.S.C. §18a; *see also* accompanying FTC regulations in Title 16 C.F.R. §§801-803.

<sup>45</sup> Indeed, in WVRC's own experience, the purchase price of its recent acquisition of Station WRVZ (FM), Pocatalico, WV in the Charleston, WV Market was far less than the statutory threshold of \$15,000,000 which would have triggered a pre-merger filing under *Hart-Scott-Rodino*. Nevertheless, the Department of Justice notified the parties to the WRVZ transaction that it intended to investigate the proposed merger, and requested the submission of information concerning the two companies involved. Apparently satisfied that the proposed merger did not present anti-competitive issues, the DOJ subsequently notified the parties *and the FCC* that it was closing its investigation and taking no further action in the matter.

<sup>46</sup> In the case of the WRVZ transaction, both the DOJ's notice of termination of its investigation, and the Staff's subsequent advisory that it still had "issues" were communicated orally to the appropriate parties. The apparent practice is not to release anything writing or in the form of a public document subject to public scrutiny.

*Mergers and Consolidations is Inefficient and Wasteful of Public Resources.* Even were we still in an era of Federal budget surpluses, it would make no sense to have multiple agencies engaged in the same or similar activity, even to the point of reviewing the same proposed transactions. Now, given the economic slump and evaporation of government budget surpluses, it is particularly wasteful of taxpayer's money for the FCC to duplicate the activity of other federal agencies. Moreover, such activity also opens the FCC to criticism that it is acting outside the scope of its Charter by the affected industry, government watchdogs and members of Congress alike.

37. As a practical matter, even if antitrust inquiries were within the statutory purview of the FCC, the Commission lacks both the manpower and expertise to conduct extensive market concentration investigations of proposed radio mergers. Attempting to play this role has led to numerous applications being held hostage to an amorphous inquiry with no clear rules defining how such situations should be resolved. The result is an inefficient use of human and financial resources.

38. The announcement by the Commission of its "Interim Policy" pending this rule making proceeding, in no way resolves this problem. For example, the MMB Staff recently flagged a proposed acquisition of an AM Station, WSPZ (Fac. #24384), Tuscaloosa, Alabama as raising undue ownership concentration and potential anti-competitive concerns in the market.<sup>47</sup> The decision by the Media Bureau to devote special Commission resources to this proposed transaction has been subject to criticism by the trade press. As observed by RADIO BUSINESS REPORT,

This is a small market (Arbitron #221), and is basically a two-radio owner duel (however, nearly 30 Arbitron 12+ shares go to stations outside of the Tuscaloosa market which are listed below the line, mostly out of Birmingham). There's the small, regional

---

<sup>47</sup> BAL-20011228AAE. See, *Public Notice, Broadcast Applications*, Report No. 25149 (released January 11, 2002).

group in question - - Houston and Voncille Pearce's Radio South, going head to head with another tiny, generally unknown radio company - - Clear Channel (N:CCU). Both companies were working with 1AM/3FM clusters in Tuscaloosa before this deal was announced. Clear Channel's cluster did a combined 25.8 rating 12+ in the Spring 2001 Arbitron; Radio South was right there with it with 24.6 combined (two other owners, with three stations between them, pulled a total of 5.6). Would the addition of WSPZ tip the scales in favor of Radio South? Not if things remain as they have been over the last few books. The station, though licensed to Tuscaloosa and reasonably well-powered for an AM at 5 kW-D, 1 kW-N, and therefore not some sort of rimshotter, has nonetheless failed to attract enough listeners to show in the Arbitron book under the care and feeding of proposed seller Willis Broadcasting. Radio South will have only the *potential* of using this AM to overtake Clear Channel. There is another factor to consider. Three of Clear Channel's six Birmingham stations draw below-the-line numbers in Tuscaloosa - - a combined 5.0, to be exact - - giving CCU that much more muscle to flex in the area. It is clear that, with a national base which is only about 1,200 stations ahead of that owned by Radio South, Clear Channel must be protected. It is good to see that the FCC is going to make sure that the ferocious Pearce-juggernaut tactic of gobbling up an unrated AM station in a tiny market operation in the shadow of a much larger market will not be used against delicate and fragile CCU, and thus bring about the end of media competition in Tuscaloosa.

RBR *Daily E-Mail*, 01/15/2002; RADIO BUSINESS REPORT (print edition), January 21, 2002.

39. The more recent designation for hearing of an application<sup>48</sup> that has been pending for almost two years does nothing to dispel the perception that the Commission is headed down a slippery slope. The nine issues designated call for the presentation of conflicting definitions of product and geographic markets, with no direction given to the ALJ as to how to resolve such arbitrary matters (other than by resort to the unproven and highly question “default” criteria announced by the Commission in establishing the “Interim Policy”).

40. Substantial private and agency resources will likely be expended in search of such a holy grail. Moreover, in the particular case designated, Charlottesville, Virginia, the economic consequences of the proposed consolidation had, for all intents and purposes, been on-going, in the form of a time brokerage agreement (“TBA”) between Air Virginia and Clear Channel Radio Licenses, Inc., the proposed Assignee, since the filing of the Application.<sup>49</sup> The *only* “harm” cited

---

<sup>48</sup> *In re Application of Air Virginia, Inc., et al.*, (FCC 02-53), MM Docket No. 02-38 (BALH-20000403ABI), released March 19, 2002.

<sup>49</sup> *HDO, supra, paras. 32, 34.*

was the competitor's<sup>50</sup> claim that Clear Channel had switched program formats on two of its stations to compete directly with Eure's stations. This is hardly the kind of "anti-competitive conduct" that should raise eyebrows. Rather, it is *exactly* the kind of activity that indicates an *absence* of collusion • the primary reason why the Commission set the case for hearing.<sup>51</sup>

41. There are plenty of agenda items already on the Commission's plate that require the Commission's particular expertise. Cooperation with other agencies, rather than attempts to duplicate their functions, should be the goal and practice of the FCC. If the Commission believes that a proposed transaction would result in an egregious concentration of market power, it has the option of referring the matter to the FTC or Justice Department. Accordingly, WVRC respectfully submits that the Commission should direct the Media Bureau to cease flagging certain proposed transactions for special economic study using criteria unrelated to the provisions of §73.3555(a).

**C. Alternate Methodologies Under Consideration by the Commission Will *Not* Address its Fundamental Concern.**

*1. The Radio Broadcast Industry is Already Substantially Consolidated.*

---

<sup>50</sup> Eure Communications tr/a Charlottesville Communications. Eure had filed a petition to deny the pending assignment application.

<sup>51</sup> See, *HDO, supra*, Note 48, paras. 43 and 46.

42. Even if the previous objections to amendment of the Rules were disregarded, the revision of radio market definitions will not address the Commission's stated concern. First, and foremost, it should be noted that the Radio Broadcast Industry is already substantially consolidated as a result of Congressionally authorized, and Commission-approved mergers and acquisitions over the past five years. If the intent of the Commission in initiating this proceeding is to put a brake on excessive radio market "concentration," any action that might be taken now is far too late.<sup>52</sup>

---

<sup>52</sup> As noted by former Commissioner Ness in her separate Statement attached to the *NPRM* in Docket 00-244, any final rules that may be issued in this proceeding, are likely to be "the gilded padlock on the proverbial barn door, with the horse of consolidation galloping over the horizon." *MM Docket 00-244 NPRM*, p. 20.

43. Moreover, changing the Rules now would only penalize a few parties in smaller markets, but would leave the large combinations untouched.<sup>53</sup> Given the current consolidated state of the broadcast industry, one might possibly conclude that the instant proceeding is little more than a public relations gesture by the Commission to demonstrate to critics that it has its finger on the pulse of the industry and is keeping the evils of over-consolidation in check. While WVRC does not doubt the sincere motives of the Commission in initiating this proceeding, it is unable to see how any action short of wide-scale restructuring of the ownership of the radio industry will achieve any result other than the uneven treatment of broadcasters in smaller markets trying to remain competitive by taking advantage of the economies of scale offered by consolidation • a benefit touted by the Commission as a necessary public interest goal less than a decade ago.<sup>54</sup>

44. Similarly, WVRC believes that the Commission's original contention that radio consolidation permits more, not less diversity of programming has been proven correct. In the Charleston, West Virginia market, for example, the ownership by WVRC of a group of stations has allowed it to provide specialized programming formats that simply would not be economically

---

<sup>53</sup> *Id.* As noted above, the Commission has said it does not contemplate retroactively applying any new rules to roll back previously approved mergers, nor requiring any divestitures of existing combinations. *MM Docket 00-244 NPRM* at ¶12-14. Moreover, an attempt to require mass *un*-consolidation through a blanket divestiture order would be subject to statutory and constitutional challenges.

<sup>54</sup> See *Duopoly Order*, *supra*, Note 10.

feasible in a standalone operation.<sup>55</sup>

---

<sup>55</sup> Each of WVRC's stations in the Charleston, West Virginia market has a different program format. Moreover, on Station WCHS (AM), WVRC provides a news-talk format. Over seven hours per day of news and public affairs programming over WCHS is *locally produced*. The balance of news/talk programming is either network news or syndicated public affairs features, such as Rush Limbaugh, as well as some regional sports network programming. In January of 2000, WVRC began programming its then LMA partner WRVZ (FM), Pocatalico, WV, with an urban format, which has been gratefully received by the minority community in Charleston. The all-news and urban formats provided by WVRC are the only such services provided by radio stations within the Charleston, WV metro.

45. WVRC recognizes that diversity of programming and diversity of ownership are not the same thing. However, those who decry the loss of diversity of local radio ownership have a myopic view of what constitutes media diversity. The Commission has repeatedly cited to the fact that there are now a plethora of media voices in almost every market.<sup>56</sup> With the rise of the Internet, and the technology permitting “streaming” audio of radio stations over the Internet, local broadcasters find themselves facing more, not less competition, from many different owners on many different media. The local citizen has only one set of ears and one set of eyes • and can only attend to one media source at a time.<sup>57</sup> If it is broadcast television or cable TV, or the Internet, or the newspaper, VCR or DVD player, or the CD or MP3 Player, or the outdoor advertising display, then it is not radio. All compete for the “hearts and minds” of the local citizenry.<sup>58</sup>

---

<sup>56</sup> See, e.g., *Inquiry into §73.1910 of the Commission’s Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, Gen. Docket No. 84-282, 102 FCC 2d 145 (1985) (“1985 Fairness Report”); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990).

<sup>57</sup> Admittedly an exception exists with respect to school-age children, who apparently are able to access multiple media sources simultaneously, such as listening to blaring rock music while doing their homework.

<sup>58</sup> The Charleston, West Virginia Radio Market, for example, is served by a plethora of competing media besides radio, including seven commercial and five noncommercial television stations, three LPTV stations, four cable systems, three MDS licensees with multichannel capacity, DirectTV DBS, three daily newspapers, two weekly papers (one of them black-owned), three college newspapers, and many internet web sites including 12 local radio stations, (at least 4000 nation-wide) and a dozen websites devoted to news and information about Charleston, WV. See Appendix I to these Comments.



2. *Reliance on Outside Commercial Services to Provide the Data to Define the Radio Market is Ill-Advised.*

46. As a way of eliminating the multiple meanings of “radio market,” the Commission has inquired whether it should return to the use of data provided by outside commercial entities, such as Arbitron to define a radio market.<sup>59</sup> The Commission acknowledged in a footnote that it had abandoned its original proposal in 1992 to use Arbitron definitions of radio *markets* due to their fluctuating nature, and Arbitron’s tendency either to undercount or overcount the number of stations in the market.<sup>60</sup> Without explanation, it has now suggested that these problems are not “insurmountable” and that use of Arbitron’s market definitions might result in more “accurate measures” of the number of radio stations than current methodologies.<sup>61</sup> WVRC respectfully submits that the use of Arbitron Audience market definitions or audience listener ratings as a means of regulating the local ownership of radio stations remains unworkable.

47. Initially, it must be noted that the Commission itself admits that many Radio Markets are not rated by Arbitron. Thus, a different system would have to be employed for those markets. This could create anomalous and inequitable results no less bothersome than the system currently used. The Commission has already had experience with using alternate methodologies, and has seen first hand the anomalous results that can be obtained.<sup>62</sup>

---

<sup>59</sup> As noted above, the Commission previously employed Arbitron audience data in processing proposed radio consolidations between 1992 and 1996. *Radio Rules and Policies Reconsideration Order, supra*, 7 FCC Rcd 6387, 71 RR 2d 227 ¶55 (1992). The use of such data to achieve even-handed results in processing such applications proved troublesome. *See*, discussion, *supra*, Paragraph 24, and accompanying note 36

<sup>60</sup> *NPRM*, p. 5, note 18.

<sup>61</sup> *Id.*

<sup>62</sup> An apt example of the kind of inequity that can occur is the *WANV* case. *WANV L.P.* sought to acquire *WANV (AM)*, Waynesboro, and *WANV-FM*, Staunton, Virginia. The applicant already owned an *AM-FM* combination in Staunton. Arbitron had originally rated the Waynesboro-Staunton market, but “declassified” it, when an insufficient number of stations subscribed to its service. Under the rules then applicable, the applicant was permitted to use a county-by-county calculation to arrive at total audience share. The Staff approved the transaction over objections by other stations in the market who had pointed

48. Separate from the “Unrated Market” problem is the fact that audience ratings vary widely from book to book and year to year. Some markets are rated only once a year, some twice, some quarterly. Dramatic changes can and do occur, due to change in formats, audience listening behavior, and economic climate.<sup>63</sup> Again, there is no need to speculate on the anomalous results that use of audience listening data can bring. It has been clearly demonstrated prior to implementation of the Telecommunications Act of 1996 under the Contour Overlap Rule.<sup>64</sup>

---

out that using current county data only for those counties making up the previously-defined metro would exceed the 25% cap permitted by the Rules. *John S. Logan, Esq. (WANV)* (1800B3-JB/LLS), Nov. 30. 1993 (BAL-930129GF *et al.*). *See also*, cases cited in footnote 36, *supra*.

<sup>63</sup> Because Arbitron lists only those stations in a market that have a certain level of listenership, a radio market can shrink or expand in terms of the number of stations reported, with each rating period.

<sup>64</sup> *Franklin Communications Partners, L.P., supra*; *Patteson Brothers, Inc., supra*; *John S. Logan, supra*.

49. Another problem with reliance on Arbitron as the defining source of radio markets is that only a limited amount of data from Arbitron is proposed to be used, *i.e.*, the number of stations *in the Metro Survey Area* receiving a 0.1% share of listeners • the so-called 12+ AQH data.<sup>65</sup> WVRC respectfully submits that reliance solely on 12+ AQH numbers artificially limits the size of the radio market by excluding stations that are outside the MSA metro but which have significant listenership.<sup>66</sup> Utilization of MSA boundaries instead of principal community contours produces a situation that is guaranteed to produce arbitrary and anomalous results. Thus, if a station places a principal community contour over some or all of the MSA, but is licensed to a community lying outside the metro, it is not listed by Arbitron in its 12+ AQH data. It is treated as an “out-of-market” station. Moreover even if the Commission were to use all of the Arbitron data showing all of the stations having listenership within the MSA, that is still an artificial limitation, since there are listeners to those same stations who reside just outside a particular jurisdictional boundary that encompasses that MSA.

50. Accordingly, using artificial boundaries such as the political boundaries of an MSA as a means of defining the radio market, while continuing to use engineering contours to determine local ownership compliance will create anomalous results even more significant than presently experienced. WVRC thus urges the Commission to reject the use of Arbitron data as a means of defining radio markets or compliance with multiple ownership rules and policies.

51. Second, use of commercially prepared *financial data*, such as that compiled by BIA, to make ownership decisions is ill-advised.<sup>67</sup> Since BIA adopts Arbitron’s market

---

<sup>65</sup> AQH = “Average Quarter Hour” number of listeners, 12 and older, listening Monday through Sunday from 6:00 a.m. to Midnight.

<sup>66</sup> Arbitron relies, in turn on the U.S. Department of Labor, Bureau of the Census for the definition of Metropolitan Statistical Areas (“MSA’s”). The boundaries of the MSA correspond to pertinent jurisdictional boundaries.

<sup>67</sup> The Media Bureau Staff currently uses data from the BIA revenue share database to determine whether or not a proposed combination should be “flagged” as presenting an undue concentration of market

definitions, and republishes its 12+ AQH data, the same problems associated with the use of Arbitron data exist with the use of BIA financial data.

52. Moreover, BIA Radio Market Revenue Data is based on self-reporting by broadcasters in the market as well as their estimates of revenues earned by their competitors. Many broadcasters decline to participate in BIA revenue surveys, and there is no means of verifying the numbers that are reported. There is no official, reliable source of station revenue data, and even using statistical methods to allow for “fudge factors” BIA’s estimates can be *substantially* in error.

---

control issue. *See, e.g., WSPZ (AM), Tuscaloosa, AL, supra*, Paragraph 38.

53. A case in point, once again, is the Charleston, West Virginia Radio Market. BIA's estimates of WVRC's 1999 revenues in the Charleston, WV Market were off by over \$2 Million, representing, in this case a 33-\_% exaggeration.<sup>68</sup> (WVRC had not participated in BIA survey of revenues). Even if all other numbers were correct the revenue percentages are thrown completely askew by the bad data. Accordingly, the Commission should not base its rules and policies on unverifiable inaccurate information that is susceptible, indeed, even *prone* to substantial distortion by those doing the voluntary reporting.<sup>69</sup>

54. Market definitions that have station revenues or audience listening preferences as their basis have inherently the same defect. As with Arbitron audience ratings, a broadcaster's share of advertising revenues can change markedly from year to year • not only due to general economic conditions, but also *vis-a-vis* other stations in the market. Reliance on BIA or other commercially prepared financial data, even if it were 100% accurate, would unfairly *freeze* a licensee's market position for the indefinite future, with the result being that the *economic basis* for such freeze would become less and less accurate over time. A change in format or the acquisition or loss of popular syndicated programming can cause both ratings and revenues to fluctuate significantly up or down in a short time frame. The Commission's decision on whether or not to permit a proposed consolidation, however, has much more lasting effect. Use of audience and revenue data to make what can amount to *allocation* decisions is simply bad public policy.

---

<sup>68</sup> "Supplemental Showing in Support of Grant of Application" amendment of 10/17/00 to BALH-20000530ACG.

<sup>69</sup> BIA's data is also subject to the same criticism as that of Arbitron's, *i.e.*, it uses the same arbitrary political boundaries to define a radio market. Thus, revenues of stations lying outside the MSA are not identified.

### III. CONCLUSION.

55. The instant proceeding and companion Docket MM 00-244 appear to be the Commission's reaction to criticism that, despite their implicit codification by Congress in the Telecommunications Act of 1996, the current rules governing the definition of radio markets should be revised. Without pointing to a single example of anti-competitive conduct or market control, the Commission states that the anomalous results in Pine Bluff, Arkansas and Youngstown, Ohio "could not have been intended" by Congress, and are *inherently* harmful. No legislative history is offered to support such a notion, and as pointed out by former Commissioner Furchtgott-Roth, "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, 'the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"<sup>70</sup>

56. Moreover, much of the criticism is based upon the assumption that the MSA, used by Arbitron in most cases to define a radio market, is a more appropriate definition for a radio market rather than the principal community contour methodology specified in §73.3555(a)(3)(ii). It must be remembered that MSA's are defined by political jurisdictional boundaries, not by radio coverage contours. The present methodology, which requires use of *city-grade* (not merely interference-free) contours assures that the number of stations counted, even though some overlap no more than tangentially, are indeed accessible, *i.e., listenable* by the populations within the defined market.

57. To adopt a definition of radio markets that depends upon what is *listened to*, rather

---

<sup>70</sup> Separate Statement of Commissioner Harold W. Furchtgott-Roth, citing *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

than what is *listenable*, is to intrude heavily on a licensee's First Amendment right to provide programming it believes will serve its listeners. Such a definition also *freezes* in place what is actually a dynamic, highly fluctuating situation that can vary dramatically from ratings book to ratings book. The federal government has neither the right, nor the expertise to make ownership decisions based upon the programming *content* of stations at a frozen moment in time, and such intrusion into a licensee's editorial judgments is clearly a violation of the First Amendment.

58. Further, any attempt made now to address what is alleged to be excessive consolidation without massive forced divestiture and heavy-handed restructuring of the industry will primarily penalize those few remaining standalones and closely-held small group owners that are trying to remain competitive in an increasingly competitive media marketplace. Adding to those licensees' burdens by blocking their attempts to achieve the economic benefits of consolidation at this late date would constitute a denial of administrative due process and equal protection of the laws.<sup>71</sup>

59. If the Commission should fail to terminate this proceeding without adopting new rules (the wisest course of action), it *must* apply any new rule *prospectively* only. Even prospective application of a new, more restrictive rule, would mean that current radio groups, created and approved under current rules, would be required to be broken up upon sale. Such action would greatly diminish the market value of the group, and deprive owners of a significant percentage of the actual value of their investment. In other cases, it could wreak financial ruin on some owners by causing a negative return on investment. In the absence of documented empirical findings by the Commission that massive restructuring of the radio industry and a return

---

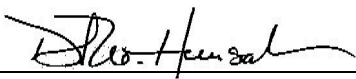
<sup>71</sup> No clearer example of the folly of implementing such a policy is the Tuscaloosa, Alabama (WSPZ) application, presently on deferred status due to the Staff's misguided use of the "interim policy." See discussion, *supra*, Paragraph 38.

to the market fragmentation of the first half of the 1990's is mandated by the public interest, WVRC believes new regulations at odds with Congressional intent will not survive judicial scrutiny. Since the Commission has not even attempted in its *NPRM* to identify or articulate specific harms whose elimination or public interest benefits to be achieved would outweigh the tremendous economic upheaval such a plan would create, it is unlikely that any reviewing judicial body would consider itself constrained to affirm such an irrational plan.

WHEREFORE, the foregoing premises considered, WVRC respectfully urges the Commission not to adopt any new rules or regulations and to terminate this proceeding forthwith.

Respectfully submitted,

**WEST VIRGINIA RADIO CORPORATION**

By:   
David M. Hunsaker  
Its Attorney

March 26, 2002

*Law Offices*  
**PUTBRESE HUNSAKER & TRENT, P.C.**  
100 Carpenter Drive, Suite 100  
P.O. Box 217  
Sterling Virginia 20167-0217  
(703) 437-8400



*NPRM, RADIO OWNERSHIP RULES*

**COMMENTS OF WEST VIRGINIA RADIO CORPORATION**

**MM Docket \_ 01-317**

**MM Docket \_ 00-244**

*Appendix I*

**Appendix I**

**DESCRIPTION OF  
MORGANTOWN-CLARKSBURG-FAIRMONT, WV  
MEDIA MARKET**



**DESCRIPTION OF  
MORGANTOWN-CLARKSBURG-FAIRMONT, WV  
MEDIA MARKET**

1. At present, the Office of Management and Budget, the agency charged with the designation and description of Metropolitan Statistical Areas (or “Metropolitan Areas”) does identify Morgantown-Clarksburg-Fairmont, West Virginia as a separate MSA. In 1995, however, Arbitron designated the area as a separate radio market, then ranked as #187, and the area has continued to be so-designated through 2001.<sup>1</sup> Morgantown and Clarksburg, however, are located in two different Television DMA’s.<sup>2</sup>

2. WVRC has undertaken a survey of the available mass media in the Morgantown-

---

<sup>1</sup> See, RADIO BUSINESS REPORT SOURCE GUIDE, 1995 Edition.

<sup>2</sup> The **Clarksburg-Weston, WV** DMA (#165) is comprised of Barbour, Doddridge, Gilmer, Harrison, Lewis, Marion, Randolph, Ritchie, Taylor, Tucker, Upshur and Webster Counties (The cities of Clarksburg and Fairmont, WV are located in this DMA). Morgantown, on the other hand, is part of the **Pittsburgh, PA** DMA (#20), which includes the two West Virginia Counties of Monongalia (in which Morgantown is located) and Preston. SOURCE: BROADCASTING & CABLE YEARBOOK 2001, pp B-175, B-219.

Clarksburg-Fairmont, WV TSA, which is presently ranked as #193.<sup>3</sup> In addition to the “traditional” forms of mass media, WVRC’s analysis will include media other than those recognized by the Commission in its multiple ownership and attribution rules, given the increasing share of audience and revenues by such media.<sup>4</sup>

**A. Broadcast Media.**

3. The Morgantown-Clarksburg-Fairmont, WV Market is comprised of three counties in the MSA and nineteen (19) counties in three States in the TSA. TABLE 2 lists the MSA and TSA counties and their estimated populations aged 12 and older as of January 1, 2001.

**Table 1: Morgantown-Clarksburg-Fairmont, WV (#193)**

---

<sup>3</sup> *Id.*, p. D-728. Arbitron rates radio markets based upon populations (12+) in both the MSA and TSA (“Total Survey Area”), the latter being the larger geographic area. The TSA rank is generally utilized by the industry as the more significant basis for comparison. In 2000 the MSA Rank for Morgantown-Clarksburg-Fairmont, WV was 187 (*Id.*, p. D-723), whereas the TSA ranking was 192 (p. D-728). That ranking was updated by the Spring, 2001 Book for Morgantown-Clarksburg-Fairmont, WV as **193**. The Morgantown-Clarksburg-Fairmont, WV *Metro* consisted of three Counties: Monongalia, Marion, and Harrison. *See*, Table 1, *infra*.

<sup>4</sup> The Commission currently considers only radio, television, cable TV and daily newspapers as other mass media that are attributable in the context of its multiple ownership rules. *See*, 47 CFR §73.3555.

**Population Estimates by County**<sup>5</sup>

<b>COUNTY</b>	<b>ST</b>	<b>12+</b>	<b>COUNTY</b>	<b>ST</b>	<b>12+</b>
Harrison*	WV	59,600	Preston	WV	24,800
Marion*	WV	47,600	Randolph	WV	24,300
Monongalia*	WV	66,600	Ritchie	WV	8,900
Garrett	MD	24,300	Taylor	WV	12,800
Greene	PA	35,300	Tucker	WV	6,500
Barbour	WV	13,500	Tyler	WV	8,200
Braxton	WV	11,000	Upshur	WV	19,800
Doddridge	WV	6,300	Webster	WV	8,400
Gilmer	WV	6,100	Wetzel	WV	15,100
Lewis	WV	14,900			
			<b>Total 12+ Population:</b>		<b>414,000</b>

\* = Metro (MSA) County.

---

<sup>5</sup> SOURCE: *Condensed Radio Market Report for Morgantown-Clarksburg-Fairmont, WV*, Spring, 2001.  
Copyright © Arbitron, Inc. 2001.

4. Arbitron lists seventeen (17) AM and FM radio stations inside the three-county Metro (MSA) area and three additional stations outside the Metro with significant listenership.<sup>6</sup> However, there are at least 54 licensed radio stations<sup>7</sup> in the TSA,<sup>8</sup> and Arbitron lists a number of “Out of Market” (MSA or TSA) radio stations that received “diary mentions” in listener diaries for the Spring, 2001 Book.<sup>9</sup> Table 2 below lists a total seventy-six (76) MSA, TSA or “listened to” out-of-market radio stations for this market.

**TABLE 2: AM and FM Radio Stations Located or Heard  
In Morgantown-Clarksburg-Fairmont, WV TSA**

	<i>Call Sign</i>	<i>Svc</i>	<i>Community of License</i>	<i>ARB</i>	<i>MSA/TSA</i>
1	WAJR	AM	Morgantown, WV	Y	MSA
2	WAJR-FM	FM	Salem, WV	Y	MSA
3	WBRB	FM	Buckhannon, WV	Y	MSA
4	WVUC	FM	Barrackville, WV	Y	MSA
5	WCLG	AM	Morgantown, WV	Y	MSA
6	WCLG-FM	FM	Morgantown, WV	Y	MSA
7	WDCI	FM	Bridgeport, WV	Y	MSA
8	WFBY	FM	Clarksburg, WV	Y	MSA

<sup>6</sup> Five of the 20 stations listed in the Spring, 2001 Report for Market #193 are owned by WVRC or its affiliates: WAJR (AM), Morgantown, WAJR-FM, Salem, WFBY (FM), Clarksburg, WVAQ (FM), Morgantown, and WSSN (FM), Weston (out of market). The combined AQH share of these five stations for persons aged 12 and older Monday through Sunday, 6:00 A.M. to Midnight, was 33.0. Arbitron REPORT, *supra* Note 5.

<sup>7</sup> NonCommercial, Educational (NCE) Stations are included in this count. Although they do not *directly* compete with commercial stations for advertising revenues, they are separate media “voices” that do compete for listeners within the TSA.

<sup>8</sup> See

<sup>9</sup> “Mentions” in this context means that a station was listened to for a minimum of five minutes during a daypart during the survey, as shown in returned diaries for the market. A station may have a “cume share” that is less than 0.1 percent, in which case, it is not included in the AQH share rankings. APPENDIX I lists all commercial and noncommercial radio stations located within the TSA as well as any out-of-market station reported by Arbitron as receiving diary mentions.

	<b>Call Sign</b>	<b>Svc</b>	<b>Community of License</b>	<b>ARB</b>	<b>MSA/TSA</b>
9	WGYE	FM	Mannington, WV	Y	MSA
10	WKKW	FM	Fairmont, WV	Y	MSA
11	WMMN	AM	Fairmont, WV	Y	MSA
12	WOBG	FM	Salem, WV	Y	MSA
13	WPDX	FM	Clarksburg, WV	Y	MSA
14	WRLF	FM	Fairmont, WV	Y	MSA
15	WVAQ	FM	Morgantown, WV	Y	MSA
16	WVHF	FM	Clarksburg, WV	Y	MSA
17	WZST	FM	Westover, WV	Y	MSA
18	WBTQ	FM	Buckhannon, WV	N	MSA
19	WBUC	AM	Buckhannon, WV	N	MSA
20	*WVPW	FM	Buckhannon, WV	N	MSA
21	*WVWC	FM	Buckhannon, WV	N	MSA
22	*WKJL	FM	Clarksburg, WV	N	MSA
23	WXKX	AM	Clarksburg, WV	N	MSA
24	WTCS	AM	Fairmont, WV	N	MSA
25	*WVPM	FM	Morgantown, WV	N	MSA
26	*WWVU	FM	Morgantown, WV	N	MSA
27	*WZWA	FM	Clarksburg, WV	N	MSA
28	WTBZ	AM	Grafton, WV	N	TSA
29	WTBZ-FM	FM	Grafton, WV	N	TSA
30	WDVE	FM	Pittsburgh, PA	Y	OM
31	WSSN	FM	Weston, WV	Y	TSA
32	WWSW	FM	Pittsburgh, WV	Y	OM
33	WFSP	AM	Kingwood, WV	N	TSA
34	WFSP-FM	FM	Kingwood, WV	N	TSA
35	WKMN	FM	Kingwood, WV	N	TSA
36	*WQAB	FM	Philippi, WV	N	TSA
37	WBHZ	FM	Elkins, WV	N	TSA
38	*WCDE	FM	Elkins, WV	N	TSA
39	WDNE	AM	Elkins, WV	N	TSA
40	WDNE-FM	FM	Elkins, WV	N	TSA
41	WELK	FM	Elkins, WV	N	TSA
42	WETZ	AM	New Martinsville, WV	N	TSA

	<b>Call Sign</b>	<b>Svc</b>	<b>Community of License</b>	<b>ARB</b>	<b>MSA/TSA</b>
43	WETZ-FM	FM	New Martinsville, WV	N	TSA
44	WNMR	FM	New Martinsville, WV	N	TSA
45	WYMJ	FM	New Martinsville, WV	N	TSA
46	WDBS	FM	Sutton, WV	N†	TSA
47	WSGB	FM	Sutton, WV	N†	TSA
48	WAFD	FM	Webster Springs, WV	N†	TSA
49	WHAW	AM	Weston, WV	N	TSA
50	WKGO	FM	Cumberland, MD	N†	OM
51	WFRB	AM	Frostburg, MD	N	TSA
52	WFRB-FM	FM	Frostburg, MD	N	TSA
53	*WFWM	FM	Frostburg, MD	N	TSA
54	*WLIC	FM	Frostburg, MD	N	TSA
55	*WAIJ	FM	Grantsville, MD	N	TSA
56	WKHJ	FM	Mountain Lake Park, MD	N	TSA
57	WMSG	AM	Oakland, MD	N	TSA
58	WWHC	FM	Oakland, MD	N	TSA
59	WWPN	FM	Westernport, MD	N	TSA
60	WOMP-FM	FM	Bellaire, OH	N†	OM
61	WRVB	FM	Marietta, OH	N†	OM
62	*WVPN	FM	Charleston, WV	N†	OM
63	WRZZ	FM	Elizabeth, WV	N†	OM
64	WGGE	FM	Parkersburg, WV	N†	OM
65	WXIL	FM	Parkersburg, WV	N†	OM
66	*WAUA	FM	Petersburg, WV	N†	OM
67	WEGW	FM	Wheeling, WV	N†	OM
68	WOVK	FM	Wheeling, WV	N†	OM
69	WWVA	FM	Wheeling, WV	N†	OM
70	*WRIJ	FM	Masontown, PA	N†	OM
71	WKST	AM	New Castle, PA	N†	OM
72	WOGG	FM	Oliver, PA	N†	OM
73	WBZZ	FM	Pittsburgh, PA	N†	OM
74	*WDUQ	FM	Pittsburgh, PA	N†	OM
75	WKST-FM	FM	Pittsburgh, PA	N†	OM
76	WANB-FM	FM	Waynesburg, PA	N†	OM



\* = NCE FM Station; ARB: Y = AQH Rated); N† = CUM rated; N = Not rated; OM = Out-of-Market Rated Station

5. As noted above, two counties in the Morgantown-Clarksburg-Fairmont ARB (Monongalia and Preston) are part of the *Pittsburgh Television DMA* (No. 20), which has 15 television stations.<sup>10</sup> Other TSA counties to the West are part of the separate Clarksburg-Weston DMA (No. 165), which has three television stations. *Id.*, at B-175.

***B. Daily Newspapers.***

6. Unlike most ARB markets having a total 12+ population of 400,000, the Morgantown-Clarksburg-Fairmont Radio Market MSA is served by *four (4)* independently owned daily newspapers, three of them having significant readership within the market. These newspapers, and their total average paid circulations are:

---

<sup>10</sup> SOURCE: 2001 BROADCASTING & CABLE YEARBOOK, p. B-219.

(1) the Morgantown DOMINION-POST	19,513 <sup>11</sup>
(2) the Clarksburg EXPONENT-TELEGRAM	16,468 <sup>12</sup>
(3) the Fairmont TIMES-WEST VIRGINIAN	12,143 <sup>13</sup>
(4) the Charleston GAZETTE/DAILY MAIL	636 <sup>14</sup>

In addition, various counties in the TSA also have independently owned daily or weekly newspapers. In Randolph County, for example, the Elkins INTER-MOUNTAIN has a paid *daily* circulation of 11,060.<sup>15</sup>

---

<sup>11</sup> SOURCE: Audit Bureau of Circulations, FAS-FAX Report -September 30, 2001. Morgantown is also served by the *Daily Athenaeum*, a daily newspaper having primary circulation (14,739) on the campus and environs of West Virginia University, which is located in Morgantown. SOURCE: West Virginia Press Services, Inc., WEST VIRGINIA NEWSPAPER DIRECTORY, 2001 (electronic edition).

<sup>12</sup> *Id.* The number is for “Combined Daily” (*i.e.*, morning and evening editions.)

<sup>13</sup> *Id.*

<sup>14</sup> SOURCE: Arbitron, Spring, 2001, *supra*, Note 5, at p. 9. The Audit Bureau of Circulations reports that the total combined daily circulation of the two newspapers (all counties) is 85,996. *Supra*, note 11. The Charleston GAZETTE and THE DAILY MAIL are separately owned daily newspapers which are operating under a Joint Operations Agreement. As required by the Newspaper Preservation Act the news and editorial staffs of the two papers are independent and separate.

<sup>15</sup> SOURCE: Audit Bureau of Circulations, FAS-FAX Report, September 30, 2001. Weekly newspapers published within the TSA are shown in TABLE 3, *supra*.

### C. Weekly Newspapers.

7. As the Commission has now acknowledged, the importance of *weekly* newspapers, as a source of local news and information for residents of a media market, is increasing.<sup>16</sup> There are weekly newspapers containing local news and information in each of the three cities listed above, as well as in many the other counties in the TSA. **Table 3** lists the following communities served by weekly newspapers within the TSA:

**TABLE 3: Weekly Newspapers Published in Morgantown-Clarksburg-Fairmont TSA<sup>17</sup>**

TSA County	Community	Name of Weekly	Paid Circulation
Barbour	Philippi	The Barbour <i>Democrat</i>	5,300
Braxton	Gassaway	The <i>MidState Star</i>	1,116
Braxton	Sutton	The Braxton <i>Citizen-News</i>	6,040
Braxton	Sutton	The Braxton <i>Democrat-Central</i>	5,151
Doddridge	West Union	The <i>Herald-Record</i>	2,809
Gilmer	Glenville	The Glenville <i>Democrat</i>	1,980
Gilmer	Glenville	The Glenville <i>Pathfinder</i>	1,600
Garrett, MD	Piedmont/Westernport	The Piedmont <i>Herald</i>	1,582
Harrison	Bridgeport	The Bridgeport <i>News</i>	4,000
Harrison	Shinston	The Shinston <i>News and Harrison County Journal</i>	3,250
Lewis	Weston	The Weston <i>Democrat</i>	7,907
Preston	Terra Alta	The Preston County <i>News</i>	3,887
Preston	Kingwood	The Preston County <i>Journal</i>	5,146
Ritchie	Harrisville	The Ritchie <i>Gazette</i>	3,509
Ritchie	Harrisville	The Pennsboro <i>News</i>	4,658
Taylor	Grafton	The Mountain <i>Statesman</i>	2,983
Tucker	Parsons	Parsons <i>Advocate</i>	3,650

<sup>16</sup> *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, DA FCC 01-262, released September 20, 2001 (hereafter “*NBCO NPRM*”) at ¶10.

<sup>17</sup> SOURCE: West Virginia Press Services, Inc., 2001 WEST VIRGINIA NEWSPAPER DIRECTORY (*electronic edition*), pp. 15-21.

TSA County	Community	Name of Weekly	Paid Circulation
Tyler	Sisterville	The Tyler <i>Star News</i>	3,330
Upshur	Buckhannon	The <i>Record-Delta</i>	3,416
Webster	Webster Springs	The Webster <i>Republican</i>	986
Webster	Webster Springs	The Webster <i>Echo</i>	3,908
Wetzel	New Martinsville	Wetzel <i>Chronicle</i>	5,000
<b>Total of Weekly Circulations:</b>			<b>81,208</b>

8. In instituting the Newspaper-Broadcast Cross-ownership (“NBCO”) proceeding the Commission noted that the combined circulation of smaller, more targeted newspapers published weekly, has more than doubled, from approximately 35.9 million in 1975, to approximately 81.6 million in 1996. These weekly newspapers are often the source of local information.<sup>18</sup> And, as estimated by the Newspaper Association of America, weekly news publications currently account for 12.9% of all advertising revenues • over \$31.4 billion.<sup>19</sup> Moreover, although the Commission previously dismissed in 1975 other media such as weekly newspapers, yellow pages and direct mail advertising “because they are not meaningful sources of information on issues of local concern,”<sup>20</sup> many of these sources do, in fact, provide news, information, and opinions on issues of local importance. Any redefinition of media market, for purposes of applying the local ownership rules, must take these sources into account.<sup>21</sup>

<sup>18</sup> *NBCO NPRM*, *supra* at ¶10.

<sup>19</sup> NAA, *Facts About Newspapers*, 2001 Ed.

<sup>20</sup> *NBCO NPRM*, *supra*, ¶44 Citing, *Local TV Ownership Report & Order*, 14 FCC Rcd at 12954, ¶114.

<sup>21</sup> Direct mail advertising, for example, has become the primary means whereby candidates for local offices reach their prospective constituencies. Direct mail also remains an important vehicle for issue-oriented advertising as well as by candidates for regional and national office. Local governments communicate to residents within their jurisdictions frequently by direct mail circulars. A number of studies have demonstrated the effectiveness of demographically targeted direct mail advertising, and this marketing

***D. Other Print Media.***

9. In addition to daily and weekly newspapers having general circulation in the Morgantown-Clarksburg-Fairmont, WV radio market, there are a number of periodical magazines that have significant readership in the area. Although national publications, these periodicals frequently have “region-specific” inserts involving regional or local issues, and often contain advertising that is local and paid for by cooperative arrangements.

10. Although information is not readily available on readership throughout the entire TSA, Arbitron has published readership statistics for the three *Metro* counties in the Morgantown-Clarksburg-Fairmont radio market. Periodicals containing news and information on national, regional and/or local issues having circulation of 1,000 or more in the Metro are listed in **Table 4** below:

**TABLE 4: SIGNIFICANT MAGAZINE CIRCULATION IN MSA**

<i>Periodical</i>	<i>Circulation</i>	<i>%</i>	<i>Periodical</i>	<i>Circulation</i>	<i>%</i>
<i>Modern Maturity</i>	18,329	22.9	<i>U.S. News &amp; WR</i>	1,861	2.3
<i>Reader's Digest</i>	9,605	12.0	<i>Outdoor Life</i>	1,847	2.3
<i>Time Magazine</i>	3,379	4.2	<i>Redbook</i>	1,842	2.3
<i>Prevention</i>	2,432	3.0	<i>Smithsonian Magazine</i>	1,327	1.7
<i>Playboy Magazine</i>	2,356	2.9	<i>Parents Magazine</i>	1,247	1.6
<i>Newsweek</i>	2,331	2.9	<i>Men's Health</i>	1,025	1.3
<i>Field &amp; Stream</i>	2,252	2.8			

research is being carried over to the Internet. As these sources become more and more important vehicles of news and information on local issues, the Commission's refusal to acknowledge them as independent “voices” becomes more and more unreasonable, arbitrary and capricious.

<i>National Inquirer</i>	1,981	2.5	<b><i>Totals:</i></b>	<b>51,814</b>	<b>64.7</b>
--------------------------	-------	-----	-----------------------	---------------	-------------

SOURCE: Arbitron Corporation, 2001; Audit Bureau of Circulations © 2000, 2001.

#### ***E. Cable Television.***

11. Numerous cable television systems operate within the greater Morgantown-Clarksburg-Fairmont, WV TSA. The National Cable Television Association lists West Virginia as having a total of 228 separate cable systems in operation with 642,550 homes passed and 497,431 basic subscribers (77.5%). Specific information regarding homes passed and basic subscribers for the TSA is not readily available. However, the Commission's Cable Database lists 270 separate Community Units operated by thirty-one (31) separate MSO's within the 17 West Virginia Counties that form the majority of the TSA.<sup>22</sup>

#### ***F. Other MVPD's.***

12. As the Commission noted in the *NBCO* proceeding:

---

<sup>22</sup> SOURCE: FCC, Cable Bureau Registration Unit ID's. (Excel File). Greene County, PA and Garret County, MD are not included.

Other multichannel programming distributors (MVPDs), most notably direct broadcast satellite (DBS) providers, now compete in the marketplace but were nonexistent in 1975. DBS has grown rapidly, and now serves nearly 13 million subscribers, or over 15% of MVPD households. Other MVPDs serve another nearly 4 million subscribers. All of these MVPDs distribute the programming of many networks.<sup>23</sup>

Because of difficult terrain in West Virginia, there are presently only a limited number of non-cable MMDS and similar MVPD operators in the Morgantown-Clarksburg-Fairmont, WV radio market. However, as noted above, West Virginia residents are able to receive DBS signals and DirecTV is listed locally throughout the market.

**G. The Internet.**

13. TVRADIO WORLD<sup>24</sup> lists five television stations and 22 radio stations licensed in the Morgantown-Clarksburg-Fairmont Radio Market that have Internet websites. In addition there are web sites for other West Virginia radio and television stations in other WV markets: Bluefield-Beckley = 33; Charleston = 25; Huntington = 29.<sup>25</sup> Each of the daily newspapers in the Morgantown-Clarksburg-Fairmont Radio Market have a web presence, as well as the daily newspapers in Charleston and Huntington. There are a number of other internet sites devoted to providing news and information on the specific communities in the Morgantown-Clarksburg-Fairmont Radio Market, as well as West Virginia generally.

---

<sup>23</sup> *NBCO NPRM*, ¶11 (citing, *Seventh Annual Report*, 16 FCC Rcd at 6037, ¶ 61).

<sup>24</sup> [www.tvradioworld.com/](http://www.tvradioworld.com/)

<sup>25</sup> *Id.*, “West Virginia Radio / TV Stations on the Internet”

14. In conclusion, the Morgantown-Clarksburg-Fairmont, WV market is teeming with media voices, many of which compete directly for advertising revenues as well as audiences. WVRC suggests that if the Commission undertook a study of every radio and television market in this country, similar results would be found. In today's media environment, it is no longer reasonable or justified for the Commission to exclude such alternative media sources from consideration in evaluating any proposed radio acquisition.



**Appendix II**

**DESCRIPTION OF  
CHARLESTON, WV  
MEDIA MARKET**



## DESCRIPTION OF CHARLESTON, WV MEDIA MARKET

1. Charleston, West Virginia, is the state capital. The 1990 Census shows the city as having a population of 57,287. Year 2000 estimates show a reduction in population to 55,960, a decline of 2.3%. The Charleston MSA<sup>1</sup> had a 1990 population of 250,454, with an increase in 2000 to 251,662.<sup>2</sup> All of the increase in the metro population was in Putnam County, to the North and West of Charleston.<sup>3</sup>

2. The demographic breakdown of the Charleston, WV MSA, based upon 1990 U.S. Census data,<sup>4</sup> is as follows:

93.20%	White/Caucasian	0.06%	Hispanic
5.30%	Black, Not Hispanic	0.10%	Native American
0.80%	Asian		

3. The Multiple Ownership Showing established that all or part of the Charleston, WV radio market receives city-grade or better signals from 12 AM and 22 FM stations (total of 34):

TABLE 1. CHARLESTON, WV RADIO MARKET

<i>Call</i>	<i>Fac. ID</i>	<i>Community</i>	<i>Freq.</i>	<i>Power</i>	<i>Licensee/Grp Owner</i>
WKEE (FM)	500	Huntington, WV	100.5 MHz	53.0 kW	AMFM, Inc.
WOKU (AM)	42653	Hurricane, WV	1080 kHz	1.0 kW	Baker Family Stns
WBES (AM)	2682	Charleston, WV	1240 kHz	1.0 kW	Bristol Bcsting

<sup>1</sup> The Charleston MSA consists of Kanawha and Putnam Counties, WV.

<sup>2</sup> SOURCE: Editor & Publisher, 2000 MARKET GUIDE, p. III-106; U.S. Census Bureau Website, West Virginia County Populations, 1990 and 2000.

<sup>3</sup> *Id.* The population increase in Putnam County between 1990 and 2000 was 20.4% (U.S. Census).

<sup>4</sup> Data from the 2000 Census is currently available only by State.

<i>Call</i>	<i>Fac. ID</i>	<i>Community</i>	<i>Freq.</i>	<i>Power</i>	<i>Licensee/Grp Owner</i>
WZJO-FM	2687	Dunbar, WV	94.5 MHz	9.6 kW	Bristol Bcsting
WVTS (AM)	6873	Charleston, WV	950 kHz	5.0 kW	Bristol Bcsting
WQBE-FM	6875	Charleston, WV	97.5 MHz	50.0 kW	Bristol Bcsting
WVSR (FM)	2684	Charleston, WV	102.7 MHz	50.0 kW	Bristol Bcsting
WAMX (FM)	60450	Milton, WV	106.3 MHz	1.65 kW	CapStar Royalty
WTCR-FM	7983	Huntington, WV	103.3 MHz	50.0 kW	CapStar Royalty
WZZW (AM)	506	Milton, WV	1600 kHz	5.0 kW	CapStar Royalty
WOAY (AM)	12550	Oak Hill, WV	820 kHz	10.0 kW	Commissioned Comm.
WCEF (FM)	40922	Ripley, WV	98.3 MHz	3.0 kW	Dailey Corp.
WDGG (FM)	21436	Ashland, KY	93.7 MHz	100.0 kW	Fifth Ave. Bcsting
WRYV (FM)	70691	Gallipolis, OH	101.5 MHz	50.0 kW	Legend Comm. of Ohio
WVOW-FM	38267	Logan, WV	101.9 MHz	15.0 kW	Logan Bcsting
WCOZ (AM)	73176	St. Albans, WV	1300 kHz	1.0 kW	L.M. Communications
WKLC-FM	73175	St. Albans, WV	105.1 MHz	3.6 kW	L.M. Communications
WMON (AM)	54371	Montgomery, WV	1340 kHz	1.0 kW	Mortenson Bcsting
WZKM (FM)	54370	Montgomery, WV	93.3 MHz	4.1 kW	Mortenson Bcsting
WEMM (FM)	43860	Huntington, WV	107.9 MHz	50.0 kW	Mortenson Bcsting
WJYP (FM)	12077	So. Charleston, WV	100.9 MHz	3.0 kW	Mortenson Bcsting
WSCW (AM)	12076	So. Charleston, WV	1410 kHz	5.0 kW	Mortenson Bcsting
WJLS (AM)	52335	Beckley, WV	560 kHz	4.5 kW	Personalty Stations
WAXS (FM)	52789	Oak Hill, WV	94.1 MHz	26.5 kW	Plateau Bcsting
WZAC-FM	53501	Danville, WV	92.5 MHz	0.6 kW	Price Bcsting
WCIR (FM)	61273	Beckley, WV	103.7 MHz	5.0 kW	Southern Comm.
WTNJ (FM)	71679	Mt. Hope, WV	105.9 MHz	50.0 kW	WV Bcsting, Inc.
*WCAW (AM)	71662	Charleston, WV	680 kHz	10.0 kW	WVRC
*WCHS (AM)	71660	Charleston, WV	580 kHz	5.0 kW	WVRC
*WSWW (AM)	19534	Charleston, WV	1490 kHz	1.0 kW	WVRC
*WKAZ (FM)	19535	Miami, WV	107.3 MHz	23.5 kW	WVRC
*WKWS (FM)	71661	Charleston, WV	96.1 MHz	45.0 kW	WVRC
*WVAF (FM)	71663	Charleston, WV	99.9 MHz	50.0 kW	WVRC
*WRVZ (FM)	71433	Pocatalico, WV	98.7 MHz	0.63 kW	WVRC

*\*Denotes part of WVRC Station Group.*

**SOURCES:** Market Study by Communications Technologies, Inc., Assignee's Exhibit B;  
BIA RADIO YEARBOOK 2000, 2001; BROADCASTING AND CABLE YEARBOOK, 2000, 2001.

## **B. The Charleston Market is Well-Served by a Plethora of Other Mass Media.**

### **1. Television Stations**

4. *Full Service Stations.* Charleston is served by three television stations locally, and

a total of twelve<sup>5</sup> full service television stations within the Charleston-Huntington DMA. The Charleston stations are:

WCHS-TV,	Channel 8	(ABC)
WVAH-TV,	Channel 11	(FOX)
WLPX-TV,	Channel 29	(IND)

The other nine full service television stations in the DMA are:

WSAZ-TV,	Huntington, WV,	Channel 3	(NBC)
WOWK-TV,	Huntington, WV,	Channel 13	(CBS)
*WOUB-TV,	Athens, OH,	Channel 20	(ETV)
*WKPI-TV,	Pikeville, KY,	Channel 22	(ETV)
*WKAS-TV,	Ashland, KY,	Channel 25	(ETV)
WHCP-TV,	Portsmouth, OH	Channel 30	(IND)
*WPBY-TV,	Huntington, WV,	Channel 33	(ETV)
*WPBO-TV,	Portsmouth, OH,	Channel 42	(ETV)
WTSF-TV,	Ashland, KY	Channel 61	(IND)

---

<sup>5</sup> An additional allotment has been made for UHF Channel 23 (Fac. ID# 83148). An Application for this channel by Pappas Telecasting of America is presently pending (960722KO). SOURCE: MMB CDBS Database.

5. *LPTV.* In addition, Charleston receives service from several LPTV or Television Translator Stations. According to the FCC's on-line database (CDBS), Charleston receives LPTV Service from three licensed facilities: W53BJ (Commonwealth Broadcasting Group), W31CA (National Minority TV, Inc.), and W23BH (Lee Enterprises, Incorporated).<sup>6</sup>

## **2. *Cable Television Service***

6. The primary cable operator serving Charleston is Capitol CableComm.<sup>7</sup> According to the 2001 BROADCASTING-CABLE YEARBOOK, the number of Cable Households in the Charleston-Huntington DMA is 343,480. Cable Penetration is 71%, or 243,871 Households.<sup>8</sup>

7. Charleston is also served by other cable and wireless cable services, including Cable Direct, Thompson Cablevision, Quick TV Cable, and DirectTV DBS.<sup>9</sup>

## **3. *Wireless Cable Services***

---

<sup>6</sup> As noted above, Pappas Telecasting of America has an application on file for a full service TV station on Channel 23.

<sup>7</sup> SOURCE: *About.com • Charleston, WV*

<sup>8</sup> 2001 BROADCASTING-CABLE YEARBOOK, p. C-2 ("Cable Penetration by Market").

<sup>9</sup> *About.com, supra*, Note 10.

8. Charleston is the community of license of several wireless cable (MDS/ITFS) services: KNSC546 (Fac. #303017 - Ch. 1) and KNSC606 (Fac. #303297 - Ch. 2A), both licensed to Wireless One PCS, Inc., and WMY398 (Fac. #301695) (Channels E1, E2, E3, & E4), licensed to Heartland Wireless Commercial Channels, Inc.<sup>10</sup>

#### **4. Newspapers**

9. Charleston is served by two separately-owned daily newspapers. The Charleston GAZETTE, a morning newspaper, is owned by the Daily Gazette Co., and has a daily circulation of 50,194.<sup>11</sup> The Charleston DAILY MAIL, an evening paper, is owned by The Daily Mail Publishing Company, a part of the Thompson Newspapers Group, and has a daily circulation of 35,802.<sup>12</sup> The Sunday GAZETTE-MAIL (cir. 91,834) is published by Charleston Newspapers, a joint operating agency of the two newspapers.<sup>13</sup> The joint agency performs business, advertising, circulation, production and printing functions for the two papers. which are corporately and editorially separate.<sup>14</sup>

10. There are also several weekly and special interest newspapers serving the

---

<sup>10</sup> SOURCE: FCC CDBS Database.

<sup>11</sup> SOURCE: AUDIT BUREAU OF CIRCULATIONS FAS-FAX REPORT - SEPT. 30, 2001.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> SOURCE: EDITOR & PUBLISHER MARKET GUIDE 2001 p. II-456. The Charleston Joint Operating Agreement is one of twelve existing joint operations created under the auspices of The Newspaper Preservation Act of 1970. SOURCE: NAA, *Facts About Newspapers, 2001 Edition* (on-line).

Charleston area. The West Virginia BEACON DIGEST is a weekly newspaper serving the African-American community of Charleston. Circulation of the paper is estimated at 21,000. The SOUTH HILLS JOURNAL is a free community newspaper serving Charleston (circulation undetermined). In addition, the STATE JOURNAL, based in Charleston, is a daily newspaper (print and on-line) containing local and West Virginia regional business news to 35,000 paid subscribers.

11. College newspapers in the area include the University of Charleston EAGLE, the West Virginia Institute of Technology TECH COLLEGIAN, (Montgomery, WV), and the West Virginia State College YELLOW JACKET.<sup>15</sup>

#### **5. Broadband Services / Internet**

12. Charleston has a number of local ISP's who provide internet services to subscribers.<sup>16</sup> A number of the area radio stations have a presence on the Internet. According to BROADCASTING & CABLE YEARBOOK (2001), the following Charleston-Huntington stations have Web sites:<sup>17</sup>

WBES-FM	WCIR (FM)	WJLS (AM)	WJYP
WJLS-FM	WKWS (FM)	WKEE (AM)	WSCW
WKEE-FM	WKLC (FM)	WQBE-FM	
WVSR (FM)	WCHS (AM)	WVAF (FM) <sup>18</sup>	

13. There are more than 4,000 radios stations across the country with an internet presence.<sup>19</sup> A number of television stations, including the network affiliated stations in

---

<sup>15</sup> SOURCE: EDITOR & PUBLISHER 1998 YEARBOOK.

<sup>16</sup> See, *Flashnet Internet Service Providers* (ISP for Charleston, WV) [http://intracities.com/ts/Charleston\\_WV](http://intracities.com/ts/Charleston_WV).

<sup>17</sup> BROADCASTING & CABLE 2001 YEARBOOK, p D-785.

<sup>18</sup> Not listed in the YEARBOOK but verified to be on-line.

<sup>19</sup> BROADCASTING & CABLE 2001 YEARBOOK, *supra* at D-734-787.



Charleston-Huntington also have websites, which feature local news and other information.<sup>20</sup>

Several websites are devoted to news and information about Charleston, including the following:

“Capitalize on Charleston”	<a href="http://wvweb.com/www/charleston_wv_cvb.html">http://wvweb.com/www/charleston_wv_cvb.html</a>
“Charleston Online”	<a href="http://www.charlestonwv.net">http://www.charlestonwv.net</a>
“WV State Guide-Charleston”	<a href="http://www.stateguide.com/wv/Charleston">http://www.stateguide.com/wv/Charleston</a>
“Charleston, WV”	<a href="http://www.about.com/charlestonwv">http://www.about.com/charlestonwv</a>
So. Charleston Community Advis. Panel	<a href="http://www.scwvcap.org/">http://www.scwvcap.org/</a>
Charleston Region Chamber of Commerce	<a href="http://charleywestchamber.org/">http://charleywestchamber.org/</a>
Charleston Daily Mail Online	<a href="http://www.dailymail.com/">http://www.dailymail.com/</a>
State of West Virginia Main Page	<a href="http://www.statewv.us/">http://www.statewv.us/</a>
Charleston Information	<a href="http://www.digitalcity.com/charlestonwv/">http://www.digitalcity.com/charlestonwv/</a>
West Virginia Public Radio	<a href="http://www.wvpubrad.org/">http://www.wvpubrad.org/</a>
Profile Charleston, WV	<a href="http://hpi.www.com/wvmun/5414600.html/">http://hpi.www.com/wvmun/5414600.html/</a>
US Cities Network	<a href="http://www.casino-king.net/o-w/wv/chastonw.html">http://www.casino-king.net/o-w/wv/chastonw.html</a>
“See WV” (College of WV)	<a href="http://www.cwv.edu/seewv/media.html">http://www.cwv.edu/seewv/media.html</a>

14. From the above analysis, it follows that Charleston, West Virginia has an abundant diversity of media outlets that address local needs and interests. It is also apparent that, with so many varied sources, no single outlet or media owner is in a position to dominate the expression of viewpoints in the community.

---

<sup>20</sup> [About.com](http://www.about.com) lists the following Charleston-Huntington TV Stations with websites: WCHS-TV8 (Home Page and Newsroom), WLPX Ch. 29, WOWK-TV13 (Home Page and Newsroom), WSAZ TV3, NBC Affiliate and Local News, WVAH - Fox 11, WVPT (Public Television includes daily wrap-up of events in the WV legislature).